United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1965

United States Court of Appeals
FOR THE SECOND CIRCUIT

NO. 74-1965

ROMAC RESOURCES, INC.
MODERN HOME INSTITUTE, INC.
Plaintiffs and Appellants

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY
HARTFORD FIRE INSURANCE COMPANY
THE AETNA CASUALTY AND SURETY COMPANY
THE TRAVELERS INSURANCE COMPANY
THE TRAVELERS INDEMNITY COMPANY
THE CONNECTICUT ASSOCIATION OF
INDEPENDENT INSURANCE AGENTS, INC.
Defendants and Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE DEFENDANT-APPELLEE THE AETNA CASUALTY AND SURETY COMPANY

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STATEMENT OF THE ISSUES

I. Can plaintiffs' allegations of a conspiracy among the insurance companies, without any overt evidence of a conspiracy and based solely on their parallel refusals to deal with the plaintiffs, survive a motion for summary judgment supported by uncontroverted evidence that each defendant's rejection of plaintiffs' offer was a unilateral, independent business decision in each defendant's economic self-interest?

II. Can plaintiffs' allegations of a conspiracy between Aetna and its agents, or the Connecticut Association of Independent Insurance Agents, Inc. (CAIA), without any overt evidence of conspiracy, survive a motion for summary judgment supported by uncontroverted evidence that Aetna's rejection of plaintiffs' offer was a unilateral, independent business decision in its economic self-interest, and that Aetna was not compelled contractually or otherwise by its agents or CAIA to reject plaintiffs' offer?

III. Did the District Court apply the correct standard in ruling on Aetna's motion for summary judgment?

STATEMENT OF THE CASE

This lawsuit is a treble-damage antitrust action by two related corporate plaintiffs against three casualty insurance companies and The Connecticut Association of Independent Insurance Agents, Inc. (CAIA), an independent insurance agents' association, alleging a concerted refusal to deal in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The essence of plaintiffs' allegations is that defendants contracted, combined, and conspired with each other to refuse to purchase from plaintiffs a list of the names of holders of private passenger automobile insurance policies with the dates on which their policies expired. The instant proceeding is an appeal by plaintiffs from the order granting summary judgment for defendants by the Honorable M. Joseph Blumenfeld of the United States District Court, District of Connecticut.

The action was begun by plaintiff Romac Resources, Inc. ("Romac"), on April 15, 1966. Originally, thirteen defendants—twelve insurance companies and CAIA—were named in the complaint. Seven weeks later, an identical action was filed by Romac's parent corporation, Modern Home Institute, Inc. ("Modern"). Each plaintiff demanded $45,000,000 in damages, and each claimed a single conspiracy among all of the defendants to boycott plaintiffs. The two actions were consolidated in 1966.

Five years later, in 1971, plaintiffs filed an amended substituted consolidated complaint which added allegations of separate conspiracies among those insurance company defendants known as "direct writers",[1] among those insurance company defendants known as "agency companies", among the agency companies and their individual agents, and among the agency companies and CAIA. Plaintiffs also

[1] "Direct writers" sell insurance directly through their own employees. "Agency companies" sell insurance indirectly through independent agents who also sell insurance of other companies.

advanced for the first time the claim that defendants were liable on a theory of conscious parallelism.

In September, 1972, after six years in which substantial discovery had been taken on both sides, plaintiffs voluntarily and without payment dismissed their action as to the seven "direct writer" insurance company defendants. The remaining defendants are The Aetna Casualty and Surety Company ("Aetna"), The Travelers Insurance Company and The Travelers Indemnity Company ("Travelers"), Hartford Accident and Indemnity Company and Hartford Fire Insurance Company ("The Hartford"), and CAIA.

Beginning on June 8, 1973, defendants moved for summary judgment. On June 25, 1973, oral argument on defendants' motions was heard by the Honorable T. Emmet Clarie. Subsequently, at the request of plaintiffs, Judge Clarie recused himself and the case was transferred to Judge Blumenfeld. (AIII 221-222)[2] By agreement of all counsel (AIII 221-222) Judge Blumenfeld decided the motions for summary judgment without further oral argument after studying the entire record, which included the verbatim transcript of the June 25, 1973 oral argument. On June 18, 1974, after more than eight years of litigation involving 150 pleadings, over 5000 pages of depositions, and numerous exhibits and affidavits, Judge Blumenfeld, in a comprehensive opinion, granted defendants' motions for summary judgment. Plaintiffs now appeal that ruling in this Court.

[2] The joint Appendix filed by plaintiffs-appellants consists of three volumes, entitled Appendix I, II and III, respectively. References to the record will state the volume number followed by the page number. For example, page 20 of Appendix I will be referred to as AI 20.

STATEMENT OF FACTS

A. Nature of Plaintiffs' Product and Defendants' Business Operations

Plaintiff Modern is a New York corporation. From 1958 to 1962, Modern was engaged in the business of gathering information known as "family profiles". (AI 22-23) Modern would contact individuals by telephone and inquire into such information as their name, address, number of children, number of automobiles owned, etc. This information would be sold to retail merchants. (AI 6-9, 22, 41-46; AIII 154-165)

One item of information which Modern began to solicit on a limited basis in 1961 was the month during which the interview subject's automobile insurance policy expired. (AI 29-30) Such dates are known in the insurance business as expiration dates or "X-dates". X-dates were solicited by Modern's part-time telephone callers by simply asking the question, "When does your automobile insurance expire?" (AIII 154-165)

Knowledge of individual X-dates is useful in the marketing of auto insurance, because a motorist who is insured by one company or agent will be more receptive to overtures from another company or agent during the period just before his current policy expires. The standard contract between an independent agent and each agency company he represents specifies that upon termination of the agency relationship, the X-dates of the agent's policyholders shall be retained by him and not by the insurance company. (AI 452) The standard contract has never been construed by Aetna to preclude Aetna or its agents from otherwise acquiring X-dates for possible use by its agents in soliciting insurance. (AI 444-445) In May, 1962, Aetna purchased 100 X-dates from Romac for test purposes. (AI 259)

During late 1961 and early 1962, Modern began to gear

its business for the solicitation and sale of X-dates. (AI 34) The plan was to sell large lists of X-dates to two—and only two—insurance companies, one "direct writer" and one "agency company". (AI 49-50) Plaintiffs would offer a small number of X-dates on a trial basis, and if the purchaser contracted for their product, they would thereafter seek to recruit personnel and obtain a larger quantity of X-dates.

Plaintiff Romac was incorporated in New York in 1962, with a capitalization of about $500, to act as Modern's sales agent in the marketing of X-dates. (AI 141-142, 144) Modern and Romac were essentially a one-man business with very limited capital. (AIII 218-220) Mr. Max Wallach is the controlling shareholder of Modern which in turn owns all of the stock of Romac. As of the beginning of fiscal year 1961, Modern had no initial capital investment remaining (AI 201) and, in the words of Mr. Wallach, the corporation was "floundering". (AI 186-193) On December 31, 1961, just prior to approaching the insurance companies with the X-date offer, Modern had no employees. (AI 212) Both corporations are now defunct. (AIII 218-220)

Between May and August, 1962 — some twelve years ago—plaintiffs offered to sell lists of X-dates to approximately thirty auto insurance companies, including Aetna, Travelers and The Hartford. (AI 136) All thirty of these insurance companies rejected plaintiffs' offer.

Beginning in April, 1964, plaintiffs communicated with the Antitrust Division of the Department of Justice and requested the Department's assistance, claiming in effect that some, but not all, of the thirty insurance companies which rejected plaintiffs' offer had conspired to boycott plaintiffs and plaintiffs' product.

On November 13, 1964, the Department of Justice wrote to Aetna and asked certain questions. (AIII 172) Aetna

responded to these on December 21, 1964. (AIII 173) Question 3 of the Department of Justice's letter said:

> "Set forth the reasons why Aetna decided against purchasing the expiration lists from Romac."

Aetna's response was:

> "Purchase of the lists was not economically feasible. We felt that the number of Aetna producers who consistently solicited private passenger automobile insurance was not sufficient to utilize the very large number of expiration dates we would have been obliged to purchase. Moreover, some of the agents who worked with the experimental list advised that they would not be interested in future lists and the majority of these agents advised that they thought the indicated purchase price was too high."

The Department of Justice asked in question 4:

> "Did Aetna consult with other insurance companies or Agents Associations concerning Romac's proposal to sell the expiration lists? If so, please furnish the identity of the persons and the companies with whom you discussed this matter."

Aetna's response was: "No."

After investigating the matter, the Department of Justice proceeded no further. Plaintiffs subsequently initiated this private antitrust action.

B. Plaintiffs' Contacts With Aetna

Defendant Aetna first met with plaintiffs on or about May 8, 1962. (AI 256) Mr. Robert E. D'Arpa, Secretary and a director of Modern, presented the plaintiffs' offer to Mr. William Ellis, Secretary of Aetna, whose primary responsibility was sales of private passenger automobile insurance. (AI 251) Mr. D'Arpa informed Mr. Ellis that plaintiffs planned to sell X-date lists to one and only one "direct writer", and one and only one "agency company". (AI 52,

257) Mr. D'Arpa stated that he would not be able to contract to sell X-dates until he had talked with all the offerees, since he wanted to sell to the two which could use the greatest number of X-dates. (AI 267) Mr. D'Arpa made it clear to Mr. Ellis that plaintiffs were anxious to find purchasers who would take plaintiffs' entire output of X-dates (AI 276), but Mr. D'Arpa did not indicate the quantity of X-dates they would produce and expect to sell. (AI 267) A quantity of X-dates was offered to Aetna on a trial basis, and Mr. Ellis purchased 100 X-dates at 30 cents each for the purpose of conducting a test. (AI 258-259) Mr. Ellis arranged for Mr. Healy, manager of the Agency Department in Aetna's Newark branch office, to conduct a trial test of the 100 X-dates purchased from plaintiffs. Mr. Healy conducted the test by sending the X-dates to various agents in New Jersey.

During the ensuing two months, as plaintiffs contacted other insurance companies with their offer, word of plaintiffs' program began to spread throughout the insurance industry. As might be expected, news of plaintiffs' plan to sell X-dates directly to the insurance companies was not enthusiastically received by independent insurance agents, many of whom regard their policyholders' X-dates as their (the agents') "property". As a result, articles and editorials appeared in several agency association publications criticizing plaintiffs' program. These writings suprised and distressed plaintiffs' officials. (AI 263)

In late June or early July, plaintiffs had their next contact with Aetna. (AI 261-262) At that time, Mr. D'Arpa and Mr. Max Wallach met with Mr. Ellis in Hartford and questioned Mr. Ellis about the critical articles. (AI 261-263) Mr. Ellis explained the philosophy of insurance agency relations and the standard provision of an agency company's agency agreement with its agents concerning X-dates. (AI 263) By the time of this meeting Commissioner Premo of the Connecticut State Insurance Department had made some

public statements about the possible illegality of the sale of X-dates in Connecticut. (AI 265)

On June 26, 1962, Mr. Ellis sent a memorandum to Aetna's managers stating that Aetna was not precluded by its agency agreements from purchasing X-dates from plaintiffs and that Aetna was currently testing the value of plaintiffs' proposal. (AI 444-445)

On July 9, 1962, Mr. Healy submitted a preliminary report to Mr. Ellis on the results of the X-date tests in New Jersey. The amount of new business developed through using the X-dates was minimal. (AI 220, 235; AIII 168-169) The tests also showed that there would be little agent participation and consequently much waste if Aetna should purchase plaintiffs' X-dates. (AI 221, 234, 239-240; AIII 170, 173)

On July 10, 1962, Mr. Ellis and Mr. H. D. Van Gils, Vice President of Aetna, went to plaintiffs' office in Pelham, New York, and met with Mr. D'Arpa and Mr. Wallach. (AI 57, 269) The purpose of the visit was to become acquainted with the plaintiffs' facilities and to discuss in more detail possible terms of sale. (AI 270-271) At Pelham, some of Aetna's problems with the program were discussed. (AI 271) These included the fact that all X-dates would need to be checked against Aetna's records and branch office records so as to remove names of individuals already insured by Aetna; and that Massachusetts would be an excluded state since Aetna was not selling its standard "Auto-Rite" policy there. (AI 271)

The number of X-dates that plaintiffs proposed to sell was stated for the first time at the Pelham meeting. (AI 137) Plaintiffs expected to generate about nine million X-dates per year for several years (AI 272), and would expect each of the two insurance companies to whom they would sell to take the entire output. (AI 58, 137) At a price of 45 cents per X-date the total annual cost to the

purchaser would exceed $4,000,000. (AI 272) Mr. Ellis and Mr. Van Gils came away from the meeting with the clear understanding that unless Aetna purchased the total number of X-dates generated—eight to ten million per year—it could not purchase any. (AI 219, 276-277)

Traveling home from Pelham, Mr. Ellis and Mr. Van Gils mutually arrived at a decision against the purchase of plaintiffs' product. (AI 233, 284-285) This was decided after the two Aetna officials discussed the large quantity involved, the total cost, and the feasibility of use. (AI 234) They discussed the possibility of the independent agents sharing a major part of the cost. (AI 234) They discussed a prior experience with a list of leads supplied by R. L. Polk Co. (AI 234) In that instance, agents had not totally and systematically followed up the leads, hence there had been waste in the program. (AI 234)

On July 16, 1962, it was announced at the weekly Aetna Agency Department Staff meeting that Aetna had decided not to purchase the X-dates offered by plaintiffs. (AII 81-82) The minutes of that meeting contain this excerpt:

> "Mr. Ellis discussed the meeting that he and Mr. Van Gils had with Romac Resources, Inc. . . . on Tuesday, July 10. It has been concluded that we will not avail ourselves of their service of obtaining X-dates. A memo to our Field Office setting forth a reason for not subscribing to this service will be sent in the future." (AII 82)

On July 17, 1962 Mr. Ellis sent to Mr. D'Arpa a letter stating that Aetna would not accept Romac's offer. (AII 82, 85)

At the July 10 Pelham meeting, Mr. Ellis and Mr. Van Gils, concerned about Aetna's ability to use the vast number of X-dates, yet of the opinion that plaintiffs had a worthwhile project, suggested to plaintiffs that the latter sell X-dates directly to individual agents. (AI 278) Mr. Ellis and Mr. Van Gils even offered to recommend the purchase

of plaintiffs' X-dates to Aetna agents, to notify agents that plaintiffs' X-dates were available, and to help plaintiffs market the X-dates to agents through Aetna's sales organization. (AI 278) One of Aetna's officials also suggested to plaintiffs that the X-dates be sold to the National Association of Insurance Agents. (AI 278) Plaintiffs later pursued this second suggestion, but without success. (AI 100-105)

C. Why Aetna Rejected Plaintiffs' Offer

Defendant Aetna gave careful consideration to plaintiffs' offer before rejecting it. The decision to reject, reached by Mr. Ellis and Mr. Van Gils, was made on the basis of Aetna's economic self-interest. (AII 83)

First, the projected purchase price of $4,000,000 was very large in both absolute and comparative terms. (AI 238-239, 292) At that time, the total Aetna advertising budget was only about $1,000,000 and attempts were being made to reduce that amount. (AI 296)

Second, although one of the terms of plaintiffs' offer was that X-dates be taken on a national basis, Aetna would not have been able to use X-dates in all 50 states. (AI 238, 273, 286-290, 293) Specifically, there was a total of seventeen states in which Aetna would not be able to make full or any use of the X-dates it would be obligated to buy. Twelve of these states lacked Aetna branch offices (AI 274), four did not have Auto-Rite, Aetna's lead policy (AI 288), and one (Connecticut) prohibited the sale of X-dates. (AI 290)

With respect to the branch office problem, Aetna's experience with the R. L. Polk program of purchasing leads was that Aetna lacked sufficient control over its independent agents to have them undertake a project and report back on its execution and completion. (AI 236, 245, 253, 255) Only through the branch offices—which were manned by Aetna employees—did Aetna have sufficient control to

handle such a project. The branch office system would therefore have to be used. (AI 280) However, the branch offices are only a small part of Aetna's total insurance marketing system. Therefore, not only could X-dates not be used in those states without branch offices, but the total number of branch offices in the other states was much too small to handle the full complement of some nine million X-dates per year.

Third, since plaintiffs would not provide the name of the company with which the individual was insured, Aetna would have to bear the additional cost of checking the lists of names against records of its present insureds at its home and branch offices. (AI 221, 271) This was necessary so that Aetna agents would not be soliciting "prospective" insureds who were already insured by Aetna. This process would have to be done manually, since in 1962 there was as yet no computer setup which would enable Aetna to computerize this process. In general, it would have been a real problem for Aetna to digest 9,000,000 X-dates per year and clear them through Aetna's records. (AI 275)

Fourth, the New Jersey X-date tests, as well as earlier experiences in marketing the Auto-Rite policy, had shown Mr. Ellis that a certain type of salesman was needed to pursue an X-date project successfully; namely, aggressive younger agents, and principally those trained in Aetna's manpower training program. (AI 281) Aetna had only at most 500 of these "manpower men", a very small number to handle nine million sales leads per year. (AI 282)

Fifth, the sales results of the New Jersey tests were minimal in terms of amount of new business developed, and indicated that there would be much waste in the program. (AI 219-220, 235)

Sixth, major participation by the independent agents in the $4,000,000 cost was essential, both to disburse this high total cost and because if agents paid more of the cost, they

would be more likely to pursue the leads diligently. However, the consensus of those agents participating in the New Jersey experiment was that they would not pay for X-dates. (AI 220, 240) In addition, some of those agents stated that they would not be interested in future X-date lists, and the majority of these agents advised that they thought the indicated purchase price was too high. (AI 170, 173)

Seventh, the opposition to the plaintiffs' program which developed among independent agents, manifested by the articles in various agents' association publications and indirectly by The Hartford's and Travelers' letters to their agents, would make it more difficult to execute a program requiring agent cooperation for success. (AI 293) However, agent opposition was neither a controlling nor a major factor in Aetna's decision to reject plaintiffs' offer. (AI 241-242) Aetna had in the past run programs to which organized agents were opposed (AI 293-294), and had other factors indicated that Aetna could have successfully and profitably operated an X-date project, Aetna would not have been deterred by agent opposition. (AI 241-242)

Eighth, although Aetna at the time had no formal program to develop sales leads, Aetna had trained its independent agents to collect X-dates on their own. (AI 230-231) Thus, some X-dates were already being generated at the agency level. However, Aetna had never itself purchased any X-dates (AI 237), and no individual or organization other than plaintiffs had ever attempted to sell X-dates. (As a matter of fact, to this date no individual or organization other than plaintiffs has ever attempted to generate and sell X-dates.)

There was absolutely no contact between any Aetna official and any other insurance company concerning plaintiffs' offer before Aetna rejected that offer. (AI 247-248, 300-301; AII 83-84) Nor was there any contact between any Aetna official and any agent or agents' association—including CAIA—concerning plaintiffs' offer before Aetna made its decision to reject it. (AI 248, 295-296, 298, 301; AII 83-84) There was one luncheon meeting at Aetna's offices, attended by seven independent insurance agents (including John B. Crosson, President of the CAIA) and several Aetna officials (including Mr. Ellis and Mr. Van Gils), at which the plaintiffs' program, among other topics, was discussed. However, that meeting occurred on July 19, 1962, three days *after* the Aetna Agency Department was informed of the earlier decision to reject and two days *after* Mr. Ellis had mailed the letter of rejection to Mr. D'Arpa. (AII 82-83)

D. Plaintiffs' Contacts With the Other Defendants

The course of plaintiffs' dealings with the other defendant insurance companies and the process by which the other defendants determined to reject plaintiffs' offer differed markedly from the events that occurred with respect to Aetna, except, of course, for the ultimate fact of refusal.

On April 18, 1962, before plaintiffs had even contacted Aetna, Mr. D'Arpa and Mr. Wallach met with two Travelers executives, Mr. John R. Coakley and the late Mr. Audrow Nash, and offered to sell Travelers lists of X-dates. However, neither Mr. Coakley nor Mr. Nash had the authority to accept such an offer: they advised plaintiffs that they would discuss the offer with Mr. Virgil I. Roby, their immediate superior, who had power to make such a decision. (AI 429-430)

Upon being informed of plaintiffs' offer by Mr. Coakley and Mr. Nash, Mr. Roby immediately and absolutely rejected it. (AI 376) His reason for rejecting plaintiffs' program was that it would undermine the principles of The American Agency System. (AI 386, 417)

By a letter of May 15, 1962, to Mr. Coakley, plaintiffs restated their proposal as it had been set forth at the April 18 meeting. (AI 431; AIII 153) Mr. Coakley replied, by

letter on May 18, that Travelers would not accept plaintiffs' offer because of Travelers' commitment to the principle of agent ownership of X-dates. Mr. Coakley did state that Travelers would consider offering X-dates to the agents, to be purchased by them, but that Travelers would not itself purchase plaintiffs' product. (AI 453) This rejection by Travelers came fully two months before Aetna rejected plaintiffs' offer, and in fact just when Aetna was beginning its test of X-dates in New Jersey.

Later, on June 25, 1962, when it became known that X-dates were being offered to other insurers, Mr. Roby directed that a letter be sent to Travelers' agents stating that Travelers would not purchase such lists because X-dates were the agents' property. (AI 392, 454) On July 5, 1962, Travelers sent such a letter to its agents advising them that the company had been offered lists of automobile insurance X-dates, but had rejected the proposal. (AI 456)

At no time prior to Travelers' rejection of the Romac proposal did any Travelers official discuss Romac or Modern, their offer, or the sale of X-dates generally, with any other insurance company. (AI 401, 404) Nor was there any contact, communication, or discussion with agents or agents' associations (including CAIA) concerning this matter. (AI 405, 419, 441)

Meanwhile, plaintiffs first contacted The Hartford in early May, 1962. On May 3, Mr. D'Arpa via telephone briefly described the Romac proposal to Mr. Channing Barlow of The Hartford. (AI 62) On May 8, Mr. D'Arpa met with Mr. Barlow, Mr. John Gilmore and Mr. Kenneth Cagney at The Hartford's offices. At this meeting, Mr. D'Arpa outlined the basic Romac proposal to The Hartford's executives. (AI 72-78, 337-339) At the conclusion of this meeting, Mr. Barlow informed Mr. D'Arpa that he was personally interested, but that the proposal had some seri-

ous problems and would require careful investigation. (AI 74, 339).

These problems included the following: First, the lists which Romac would supply would not include the name of each individual's present insurer; therefore either The Hartford would have to bear the cost of culling the names of its own policyholders, or existing Hartford policyholders would be solicited by the agents. (AI 320, 333-341) Second, the name of the individual's current agent would not be known, so that in some instances The Hartford would be supplying its agents with names of customers of other of its agents. This had the potential to cause serious harm to the relations between The Hartford and its independent agents. (AI 320, 347) Third, the price plaintiffs wanted was very high: 45 cents per X-date, compared with the two cents per name The Hartford had been paying to Ruben H. Donnelly Co. for lists of names and addresses of automobile owners by geographic area. (AI 331) Fourth, there were worries about Romac's and Modern's ability to develop a viable organization. (AI 72-74, 338)

These problems were discussed by Mr. Barlow, Mr. Cagney, and Mr. Gilmore, who immediately took a position against plaintiffs' offer (AI 319-320), after the May 8 meeting. Discussions were had with other officials of The Hartford during May. (AI 342) Finally, at a staff meeting on May 21, 1962, a decision was reached not to accept plaintiffs' offer. (AII 66-67) Mr. Barlow communicated this decision to Mr. Wallach by letter of May 31. (AII 68) This was approximately six weeks before Aetna rejected plaintiffs' offer.

Mr. Barlow had also realized that the difficulties that The Hartford would have in making use of the plaintiffs' product might not be experienced by other companies, particularly the direct writers, and that one or more of those companies could therefore be expected to purchase X-dates.

Because of this, Mr. Barlow and his associates felt that The Hartford's agents should be alerted to the substance of plaintiffs' program. (AI 354-355) Accordingly, a letter to agents was prepared, and was released on June 6, 1962. (AII 69-71)

At no time prior to The Hartford's rejection of the plaintiffs' proposal did any official of The Hartford discuss the proposal, or its acceptance or rejection, with any other insurance company defendant. (AI 323-324, 354, 358) Nor was there any discussion of the plaintiffs' offer with any agent or agency group. (AI 347)

Plaintiffs had no contact whatever with CAIA.

E. Plaintiffs' Contacts With Other Insurance Companies

Plaintiffs contacted a total of "approximately thirty" insurance companies concerning their offer. (AI 136) All thirty companies rejected plaintiffs' offer.

Among the insurance companies which received and rejected plaintiffs' offer were Liberty Mutual Insurance Company, Liberty Mutual Fire Insurance Company, Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, State Farm Mutual Insurance Company, State Farm Fire and Casualty Company, and Allstate Insurance Company. Each of these companies was originally named by plaintiffs as a defendant in this case, and charged with having participated in the alleged "conspiracy" to boycott plaintiffs. The action against each of these defendants, however, was subsequently voluntarily dismissed by plaintiffs.

Executives of the Nationwide companies and the Liberty Mutual companies have been deposed concerning their contacts with plaintiffs and the surrounding circumstances. Each testified that his company had not had any contacts or discussions with any other insurance company with respect to plaintiffs' proposal. (AI 302-310, 313)

SUMMARY OF ARGUMENT

This appeal is from a grant of summary judgment for the defendants, Aetna, Travelers, The Hartford and CAIA, against the plaintiffs, Romac and Modern. After reviewing the voluminous record below, Judge Blumenfeld found that

> "[t]here is nothing other than the simple fact that each defendant rejected the plaintiffs' proposal on which to base an inference of conspiracy. The arguments of the plaintiffs that it was against the self-interest of each defendant to reject their proposal are completely unsupported." (AII 56)

Plaintiffs have attempted, despite their recent disavowal of this theory on appeal, to use a theory of "conscious parallelism" to raise an inference of a conspiracy among the insurance company defendants to refuse to deal with plaintiffs. This is in the absence of any evidence — and in fact, in the face of defendants' uncontroverted denials — of any agreement among any of the defendants. Defendants produced additional uncontroverted evidence which establishes that (1) the insurance companies' actions were "parallel" only in the ultimate fact of refusal; (2) each defendant's rejection was a unilateral, independent business decision; and (3) rejection of plaintiffs' proposal was not contrary to Aetna's economic self-interest. As a matter of law, this evidence, if not rebutted, destroys any inference of agreement or conspiracy that may arise from parallel business behavior. To survive a motion for summary judgment, plaintiffs are required to present specific facts raising a genuine issue for trial. Plaintiffs have failed to do this.

Plaintiffs have tried to base their allegations of a conspiracy between Aetna and the CAIA—and between Aetna and its independent agents generally—on various theories, such as that Aetna was "coerced" by agents into rejecting plaintiffs' offer, or that Aetna's standard agency contract violated the antitrust laws. However, Aetna's uncontroverted evidence shows (1) that Aetna never met, agreed,

consulted, or conspired with any agents or agents' association prior to rejecting plaintiffs' offer; (2) that Aetna did not feel "coerced" by "agent opposition" into rejecting plaintiffs' offer; (3) that Aetna did not feel compelled by the American Agency System to reject plaintiffs' offer; (4) that the standard agency contract did not preclude Aetna from dealing with plaintiffs, nor in any other way unreasonably restrain trade; and (5) that agent opposition was but one factor among many which Aetna considered in determining that purchase of the X-dates was not in Aetna's economic self-interest. Plaintiffs again have failed to respond to this overwhelming evidence with sufficient specific facts to raise a triable issue as to the existence of the alleged "conspiracy".

Therefore, under the standard set by Federal Rule 56—as interpreted by the United States Supreme Court in antitrust litigation and as correctly applied by the District Court in this action—summary judgment for the defendant Aetna was proper.

The District Court in its opinion treated the issue—which had not been raised by any party—of the possible antitrust illegality of plaintiffs' "exclusive dealing" offer. The District Court did not rule that plaintiffs' offer was illegal, but only pointed to the risk of possible illegality as an additional reason for an insurance company to reject the plaintiffs' offer. However, this issue did not control the District Court's decision, since the District Court also cited a number of other business justifications for the defendants' rejection of plaintiffs' offer. Summary judgment for the defendants would have been appropriate even had this "exclusive dealing" issue not been raised.

ARGUMENT

I.

THERE WAS NO CONSPIRACY AMONG AETNA, TRAVELERS AND THE HARTFORD

A. Plaintiffs Have Produced No Direct Evidence Of Conspiracy

Despite eight years of extensive discovery, in which plaintiffs took lengthy depositions of all the principal officers of the defendants, reviewed a voluminous record of documents and received answers to numerous interrogatories, plaintiffs lack any direct evidence that the three defendant insurance companies met and agreed to refuse to deal with plaintiffs. Even plaintiffs' counsel, in his brief filed with this Court and at oral argument in the District Court, has admitted this. (Plaintiffs-Appellants' Brief, p. 39; AIII 188) In the absence of any such evidence, the plaintiffs have attempted to establish proof of a conspiracy indirectly through allegations that (1) defendants' actions were parallel and (2) defendants' actions were not in their self-interest unless all defendants acted in the same way.

Recognizing that their case must fail under the theory of conscious parallelism, plaintiffs have attempted to disavow that label and escape summary judgment by simply alleging that the defendants' refusals to purchase were "interdependent". (Plaintiffs-Appellants' Brief, pp. 36-37) Regardless of the label, plaintiffs' case fails because (1) defendants' actions were parallel *only* in the ultimate refusal to purchase, and (2) each defendant's rejection of plaintiffs' offer was a unilateral, independent decision in each defendant's economic self-interest.

B. The Defendants' Actions Were "Parallel" Only In The Ultimate Fact Of Refusal

Plaintiffs attempt in their brief to establish an implied conspiracy out of thin allegations that defendants all acted in parallel fashion by (1) expressing initial interest in the X-date program, (2) recognizing the alleged "conflicts" with the principles of the American Agency System, and (3) instituting or succumbing to the so-called "campaign of pressure".

In the absence of any documentary or other direct evidence, plaintiffs rely on the blanket assumption that the X-date program was so good that "none of the companies could turn down plaintiffs' proposal without assurance that the other companies would similarly turn down plaintiffs' offer." (Plaintiffs-Appellants' Brief, p. 26) That assumption fails in the light of the uncontroverted evidence discussed below of the huge costs and other problems connected with the proposal which would lead any reasonable businessman to reject it and which apparently led to its rejection by the 27 other companies not charged with conspiracy which were approached by plaintiffs.

What the evidence does show, when viewed most favorably to plaintiffs, is that the actions of Aetna, Travelers and The Hartford with respect to plaintiffs' offer were parallel only in that each insurer ultimately rejected that offer. As the foregoing summary of facts shows, the three insurance companies gave varying degrees of study and consideration to plaintiffs' proposal. Instead of showing initial interest, Travelers rejected plaintiffs' offer with virtually no consideration. Mr. Virgil Roby, the executive with responsibility for such matters, rejected the offer immediately and absolutely upon hearing of it. After that, Travelers gave no further thought to accepting the Romac offer.

The Hartford, by comparison, although struck from the beginning by potential problems with the Romac program,

did give it some internal study. After the May 8, 1962 meeting, at which Mr. D'Arpa outlined the program to several officials of The Hartford, discussions were had among various company officials on the feasibility of using plaintiffs' X-dates. On May 21, 1962, at a staff meeting, the final decision to reject was made.

Finally, Aetna gave considerable thought and consideration to plaintiffs' offer. Aetna even purchased 100 X-dates from Romac and conducted a test in New Jersey so as to evaluate the accuracy and usefulness of plaintiffs' X-dates. Throughout most of this testing—slightly less than two months—Aetna continued to express interest in plaintiffs' program. It was not until the second week of July, 1962 when Aetna (1) received the results of the New Jersey tests and found them unpersuasive and (2) discovered for the first time at the Pelham meeting what the scope and cost of plaintiffs' proposal was, that Aetna determined to reject the proposal.

In addition to the different reactions to plaintiffs' offer, the three insurance company defendants had varying reasons for rejecting it. Travelers was worried almost exclusively about conflicts with the American Agency System of representation. The Hartford worried about agency relations, high cost per name, the fact that Romac's lists would include names of current Hartford policyholders, and the ability of Romac and Modern to put together a viable organization. The determining facts for Aetna were those that Mr. Ellis and Mr. Van Gils learned at the July 10 Pelham meeting, namely, the huge total cost (four times Aetna's existing advertising budget) and the huge number of X-dates Aetna would have to purchase—many of which Aetna would not be able to use. Other contributing considerations included the inconclusive test results, the added expense of checking plaintiffs' lists for names of Aetna policyholders, the indifferent or negative reactions of agents participating in the New Jersey test, and possible agent opposition to implementation of the program.

Aetna did not reject the proposal because of any belief that it violated the principles of the American Agency System, as discussed *infra,* part II B, or because of any so-called "campaign of pressure", as discussed *infra,* part II C.

Even though each defendant ultimately rejected plaintiffs' offer, the fact that each defendant took a different route to this decision demonstrates that the defendants were acting not in concert nor even in parallel, but rather individually. In *Delaware Valley Marine Supply Co. v. American Tobacco Co.,* 297 F.2d 199 (3d Cir. 1961), *cert. denied,* 369 U.S. 839 (1962), a plaintiff who had been refused a distributorship by several tobacco companies based his antitrust suit against them on a theory of conscious parallelism. Affirming a directed verdict for the defendants, the Third Circuit noted that some defendants gave plaintiff's offer serious consideration, while others rejected it summarily. With respect to the ultimate, common fact of refusal, the court stated that each of the five defendants could have said "yes" or "no". All five said "no".

> "The suspicion which would be created by the unlikelihood of numerous firms reaching one of many possible conclusions [e.g., if five bidders submit bids identical to the last cent] is lacking and therefore the unanimity of the tobacco companies' rejections of the plaintiff's applications can afford no substantial basis for an inference of conspiracy." 297 F.2d at 205.

In *Independent Iron Works, Inc. v. United States Steel Corp.,* 322 F.2d 656 (9th Cir. 1963), another case in which a "conscious parallelism" theory was rejected and a verdict directed against the plaintiff, the fact that the defendants used a variety of business operations strongly suggested individual action to the Circuit Court.

What the varied actions of the insurance company defendants *do* show is that each acted individually, and that the decision of each to reject plaintiffs' offer was mandated

by individual business decisions. A common refusal to deal, where each defendant's refusal is based on an independent business decision, is of course not a violation of the Sherman Act; and evidence of "independent business decisions" refutes the inference of concerted action that may arise from the fact of a common refusal to deal. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 274-84 (1968); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Independent Iron Works, Inc. v. United States Steel Corp., supra;* see *Report of the Attorney General's National Committee to Study the Antitrust Laws* 38-40 (1955); Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 *Harv. L. Rev.* 655, 658-59, 681 (1962).

C. Acceptance Of Plaintiffs' Offer Would Not Have Been In Aetna's Economic Self-Interest

The basic assumption underlying plaintiffs' attempts to prove that Aetna's rejection was interdependent is that acceptance of plaintiffs' offer would have been in Aetna's economic self-interest. Indeed, an important aspect of the theory of conscious parallelism is that the actions of the alleged co-conspirators must be in contradiction of their individual economic self-interest. *Winchester Theatre Co. v. Paramount Film Distributing Corp.*, 324 F.2d 652 (1st Cir. 1963); *Delaware Valley Marine Supply Co. v. American Tobacco Co., supra; Pacific Tobacco Corp. v. The American Tobacco Co., Inc.*, 1974 Trade Cas. ¶74,991 (D. Ore. 1974); *see* Turner, *supra* at 681. In the instant situation, Aetna's rejection of plaintiffs' offer did not contradict Aetna's economic self-interest. Rather, the facts clearly show that *rejection* was in Aetna's economic self-interest.

The arsenal of reasons which Aetna had for rejecting the Romac offer could hardly be more imposing or con-

vincing. Here was a corporation, incorporated less than a year, with a capitalization of $500, asking a major insurance company to commit the expenditure of some $4,000,000 per year for a period of several years. This $4,000,000 annual expenditure would have been for advertising-sales promotional purposes, yet Aetna was not only spending less than $1,000,000 per year for such purposes at the time, but was making efforts to reduce even the latter figure. Further, the expense of the Romac program did not stop with the $4,000,000 purchase price. Aetna would also have had to bear the substantial cost of checking plaintiffs' lists of names against its home office and branch office records to cull out the names of existing Aetna policyholders. Aetna could only hope to bear these large expenses if its independent agents would share in the cost of purchasing the X-dates, but indications were clear that few agents would be willing to so participate.

Not only was plaintiffs' product expensive; Aetna would not have been able to utilize all the X-dates it would have been obligated to buy. In fully seventeen states Aetna would have been able to make little or no use of plaintiffs' X-dates; yet the terms of the offer required Aetna to pay for these X-dates anyway. Overall, Aetna did not have the sales organization to handle the 9,000,000 X-dates plaintiffs would generate annually. Aetna's branch office system—through which Aetna could exercise maximum control over the execution of the program—was not large enough nor extensive enough geographically to handle this many X-dates. Nor did Aetna have anywhere near a sufficient number of independent agents of the type that Aetna felt was necessary to handle an X-date project.

Further, there were indications of agent opposition to the X-date program. The agents who participated in the New Jersey X-date tests indicated, at best, indifference to the use of X-dates. The editorials appearing in trade publications made it clear that many organized agents were

opposed. Such opposition would have increased the difficulty of efficiently using plaintiffs' product and pointed to the conclusion that there was little, if any, likelihood that the agents would underwrite the majority of the $4,000,000 annual cost.

Finally, the value of plaintiffs' product as a sales promotional device was dubious. Plaintiffs' X-dates, which plaintiffs tout as providing a "great competitive advantage", generated only minimal new business when tested in New Jersey.

Aetna's decision certainly cannot therefore be characterized as "contrary to its economic self-interest". As Judge Blumenfeld specifically found:

> "The conclusion of the Aetna, arrived at after thorough consideration of the many factors involved, that the plaintiffs' price for X-dates was too high, is brushed aside by plaintiffs. They offer nothing but puffing chatter to rebut the reasoning which led to that conclusion." (AII 48)

There is nothing in plaintiffs' brief and nothing in the record to refute that finding. In the absence of acts by Aetna contrary to its economic self-interest, no inference of conspiracy may be drawn, even if Aetna acted in consciously parallel fashion with the other defendants. *Pacific Tobacco Corp. v. The American Tobacco Co., Inc., supra; Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 747 (N.D. Cal. 1959), *aff'd*, 322 F.2d 656 (9th Cir. 1963); *North Penn Oil and Tire Co. v. Phillips Petroleum Co.*, 358 F. Supp. 908, 923 (E. D. Pa. 1973); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra; Delaware Valley Marine Supply Co. v. American Tobacco Co. supra; First National Bank of Arizona v. Cities Service Co., supra.*

Nowhere in their brief, despite the section entitled "The Output Problem Was Nonexistent", do plaintiffs point to

any evidence that it was not in Aetna's best interest to reject plaintiffs' offer of 9,000,000 X-dates at $4,000,000 per year. Nor do plaintiffs point to any evidence to support their claim on appeal that plaintiffs offered to, or would, reduce the number of X-dates or eliminate geographic areas; it was a take-it-or-leave-it proposition. (AI 276-277) As Judge Blumenfeld specifically found, "Mr. Ellis and Mr. Van Gils came away from the conference with the definite understanding that unless they took the total number of X-dates to be generated, amounting to 8,000,000 to 10,000,000 a year, they could not have any." (AII 30)

Indeed, if it would have been economically advantageous to an insurance company to purchase plaintiffs' product, why did all thirty insurance companies approached by plaintiffs reject the offer, especially the direct writer companies? The direct writers are logical, because (1) they have a substantial share of the automobile insurance market,[3] and (2) unlike the agency companies, they control their employee salesmen and could therefore completely and efficiently utilize the X-date sales leads offered by plaintiffs. Direct writers would not have had to worry about opposition from independent agents since they have none.

Yet there is no claim now extant that any direct writer rejected plaintiffs' offer because of some imagined conspiracy. The conclusion is obvious: rational businessmen reached the conclusion that it was not in their best economic interest to purchase plaintiffs' program.

It is difficult to see how plaintiffs can claim that rejection by the three defendants was the cause of their failure. This claim could only be made if the three defendants had the vast majority of the market, so that other avenues of sale were not open to plaintiffs. But that is simply not the

[3] In 1962, Nationwide, Liberty, State Farm and Allstate together had 21% of the market computed on net premiums. This is seven times the amount of Aetna's share, and twice the amount of the combined shares of The Hartford, Travelers and Aetna. (AIII 174-187)

case. This is set in bold relief when it is realized that Aetna had only 3% of the market, and The Hartford, Travelers and Aetna combined had less than 11% of the market. (AIII 174-187) The logical question then becomes, "Where is the other 90% of the market?" The logical answer to the question is that it was not in the economic self-interest of any insurance company in the United States to accept plaintiffs' offer. Plaintiffs' failure was theirs alone.

Plaintiffs' failure to show that rejection was contrary to Aetna's self-interest completely destroys the foundation on which plaintiffs' theory is premised. As plaintiffs argue (Plaintiffs-Appellants' Brief, p. 38):

> ". . . we claim that the decisions which were made were consistent with defendants self-interest *only* if all concerned decided the same way . . ." (emphasis added)

Despite that claim, there is nothing in the record to support it. At most, an inference could be drawn that it would be preferable from Aetna's standpoint that other companies not purchase the X-dates, but the stark fact remains that it was in Aetna's economic self-interest to reject the $4,000,000 annual program *irrespective* of whether other companies bought the program or rejected it.

D. No "Agreement" To Refuse Plaintiffs' Offer Existed Among Aetna, Travelers and The Hartford.

As pointed out above, in the absence of any overt evidence of a conspiracy, plaintiffs have resorted to the theory of "conscious parallelism". They have attempted to prove an implied conspiracy through allegations of parallel decisions which would otherwise be against one's self-interest.

Even under the "conscious parallelism" theory, however, plaintiffs must demonstrate more than parallel decisions by the defendants. Plaintiffs must come forward with evi-

dence that a *conspiracy* in fact existed, that is, that there was *agreement* among the defendants. As the Supreme Court stated in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra:*

> "The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement . . . . But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but conscious parallelism has not yet read conspiracy out of the Sherman Act entirely." 346 U.S. at 540-541.

The crucial fact which plaintiffs must therefore establish is that of *agreement* among the insurance company defendants, express or implied, to refuse to purchase plaintiffs' product. *Pacific Tobacco Corp. v. The American Tobacco Co., Inc., supra; Report of the Attorney General's National Committee, supra* at 39. And, as Professor Turner states:

> "[I]dentical but unrelated responses by a group of similarly situated competitors to the same set of economic facts . . . is not 'agreement' by any stretch of the imagination . . . . The point is that conscious parallelism is never meaningful of itself, but always assumes whatever significance it might have from additional facts." 75 *Harv. L. Rev.* 655, 658 (1962).

It has already been shown that the "additional facts" in this case demonstrate that the rejections of plaintiffs' offer by each of the three defendants was the result of rational individual business decisions. Plaintiffs' offer was simply not attractive to defendants (or to the 27 other insurance companies to which it was made), in light of their indi-

vidual business situations and economic self-interests. This is uncontroverted evidence that defendants' "respective actions were prompted by some fact other than mutual understanding or agreement". *Independent Iron Works, Inc. v. United States Steel Corp., supra* at 661.

In those cases in which "conscious parallelism" and similar theories have been used to support a finding of agreement, there have been additional factors beyond those present in the case at bar. In the case of *Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939), a key element was the presence of a letter addressed to the alleged co-conspirators detailing the illegal plan which was carried out by the addressees. Other factors were the failure of the alleged co-conspirators to offer testimony and the fact that the alleged illegal action constituted a change from existing business practices. *Eastern States Retail Lumber Dealers Ass'n. v. United States,* 234 U.S. 600 (1914); *United States v. Masonite Corp.,* 316 U.S. 265 (1942); *United States v. United States Gypsum Co.,* 333 U.S. 364, 394 (1948); *Federal Trade Commission v. Cement Institute,* 333 U.S. 683 (1948). Cf. *Ball v. Paramount Pictures,* 169 F.2d 317 (3rd Cir. 1948), *cert. denied,* 339 U.S. 911 (1950).

None of these "additional factors" appears in the facts of the case at bar. There was no "invitation to participate in a plan" initiated by any of the insurance company defendants. Any attempt by plaintiffs to characterize agent association publicity as an "invitation" to the insurers is misplaced, as a comparison with the letter sent in *Interstate Circuit* clearly shows. Nor can plaintiffs rely on the letters which The Hartford and Travelers sent to their agents. These letters were intended as internal documents only, having the purpose of informing each company's agents of the position it had taken with respect to plaintiffs' offer. Such desire to inform their agents of their rejections of the X-date offers was a reasonable one on the part of The Hartford and Travelers, in view of the wide-

spread opposition there seemed to be among agents generally towards plaintiffs' program. Unlike the letter in *Interstate Circuit,* the letters sent by The Hartford and Travelers were not intended as an invitation to competitors to participate in a scheme in restraint of trade. In fact, Mr. Barlow of The Hartford even deposed that that company's letter was distributed with the thought in mind that some other company would probably buy plaintiffs' product, hence The Hartford's agents ought to be warned of this possibility.

Further, the defendants did not change an existing business practice. They simply refused to buy a new, untested (at least on the scale contemplated by Romac) product, preferring instead to continue existing sales promotional practices. The defendants' uniform actions are thus much less suspicious than would be a uniform change to adopt a new practice.

The defendants have also not declined to offer the testimony of their top executives. The executives from each company responsible for making the decision to reject plaintiffs' offer have testified via deposition and affidavit. This evidence has established the independent business decisions that were behind each company's rejection of the Romac proposal. Unlike *Interstate Circuit,* defendants here have readily assumed their burden of "going forward with the evidence to explain away or contradict" an inference of agreement that might arise from parallel behavior. And, as was demonstrated at length earlier, the Aetna's rejection of plaintiffs' offer was not contrary to Aetna's economic self-interest.

All that the plaintiffs really have to offer as "evidence" of the alleged "agreement" between Aetna, Travelers and The Hartford is the fact that each of these insurance companies rejected plaintiffs' offer. This, without the presentation of additional evidence by plaintiff, has consistently been found insufficient to support a conclusion that there

was "agreement". *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., supra; First National Bank of Arizona v. Cities Service Co., supra; Kreager v. General Electric Co.*, 497 F.2d 468 (2d Cir. 1974); *Winchester Theatre Co. v. Paramount Film Distributing Corp., supra; Independent Iron Works, Inc. v. United States Steel Corp., supra; Delaware Valley Marine Supply Co. v. American Tobacco Co., supra; Pacific Tobacco Corp. v. The American Tobacco Co., Inc., supra;* see also *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71, 84-85 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), *rehearing denied*, 397 U.S. 1003 (1970); Note, Conscious Parallelism-Fact or Fancy?, 3 *Stan. L. Rev.* 679, 694 (1951).

Such "evidence" is insufficient in this case, too.

II.

THERE WAS NO CONSPIRACY BETWEEN AETNA AND ANY AGENTS OR AGENTS' ASSOCIATION

A. There Was No Meeting, Discussion or Communication Between Aetna and Any Agents or Agents' Association Prior to Aetna's Rejection of Plaintiffs' Offer

In an effort to create some basis for inferring a "conspiracy" from the instant set of facts, plaintiffs included the Connecticut Association of Independent Insurance Agents, Inc. as a party defendant. Plaintiffs contend that because many independent agents were opposed to plaintiffs' program, the CAIA—an organization of independent agents—somehow "coerced" the Aetna into rejecting plaintiffs' proposal.

Plaintiffs have introduced no evidence of any meetings, contacts or communications between Aetna and any individual agent or agents' association concerning the Romac

proposal at any time prior to July 17, 1962, the date on which Aetna's letter of rejection was mailed to Mr. D'Arpa of Romac. In fact, Mr. Ellis of Aetna testified that no such meetings occurred. (AI 248, 295-296, 298, 301; AII 83-84) The only meeting referred to occurred *after* Aetna's letter of rejection was sent to plaintiffs and is therefore without significance toward showing any "coercion" by the CAIA against Aetna, or any "conspiracy" between these two defendants.

B. Aetna Did Not Feel the American Agency System Compelled It To Reject Plaintiffs' Offer

In the absence of any direct evidence of a conspiracy between Aetna and any agents or agents' association, plaintiffs claim that Aetna felt compelled by the standard contract between Aetna and its independent agents—including the clause comprising what is known as the "American Agency System"—to reject plaintiffs' offer. These allegations are totally unsupported by the record.

Aetna's uncontroverted evidence shows that Aetna did not feel barred by the American Agency System or by the specific contracts from accepting plaintiffs' offer.

The following excerpt is representative of the standard contract between Aetna and its independent agents which has been used before, during and since the time of plaintiffs' approach to Aetna:

> "In the event of the termination of this Agreement, and provided the Agent has promptly accounted for and paid to each of the companies all premiums for which the Agent may be liable and is not otherwise financially indebted to any of the companies, each of the companies agrees that the Agent's record of policyholders and expiration dates of policies or bonds shall remain in his exclusive possession and that said company's record or knowledge of names of policyholders and expiration dates shall not be referred or communicated by said company to any other agents nor used

by said company for purposes of solicitation." (AI 452)

This contract pertains only to the agent's personal records of his policyholders and their expiration dates. It simply establishes that, upon termination of the agency relationship, Aetna will not use its copies of these records to solicit sales in competition with the terminating agent, or give these records to a competing agent. It says nothing about the records of policyholders of X-dates which Aetna might acquire from other sources, such as plaintiffs. It pertains only to the disposition of customer lists as between Aetna and the independent agent on the occurrence of a condition precedent—"in the event of the termination of this Agreement." It clearly does *not* bar Aetna from acquiring X-dates from other sources.

Further, Aetna did not interpret this contract to constitute a bar to Aetna's acceptance of plaintiffs' proposal. Mr. Ellis explained in his deposition that, while many agents feel that they own the expiration dates of their customers, he (Mr. Ellis) felt that "the agent owns them [X-dates] to the extent that the insured will permit him to own them." (AI 263) That is, the policyholder may give his X-date to, or place his insurance with, anyone he desires, including his own agent, other agents, Aetna, or plaintiffs. Aetna's contract not to release an agent's personal records does not preclude it from acquiring and using X-dates released by the policyholder himself.

Mr. Ellis' memorandum to Aetna's managers on June 27, 1962 emphatically states that Aetna did not consider its standard contract or the principles of the American Agency System a deterrent to purchasing X-dates:

> "While we will not concede that any agency company is more careful to observe the essential tenets of the American Agency System, and while it is a matter of company policy—augmented by our agency contracts —that we never turn one agent's records over to an-

other, it had never occurred to us that any agency company or any group of agents would take the position that the Hartford and the New York State Association of Insurance Agents have, because from time immemorial independent agents have been prospecting and obtaining the expiration dates of policyholders. . . . We know of nothing in the American Agency System or in the free enterprise system which would indicate in any way that one agent or one company should refrain from obtaining the business of another, as long as they act honorably and ethically." (AI 444-445)

Mr. Ellis was fully aware of Aetna's contracts with its agents when he met with Mr. D'Arpa and Mr. Wallach and when he went to Pelham on July 10, 1962, but that did not deter him.

C. Aetna Was Not Coerced By Agent Opposition

Plaintiffs have attempted to prove a conspiracy between Aetna and its agents by referring to the so-called "campaign of pressure" allegedly mounted by various agents and agents' associations against the plaintiffs' proposal. Plaintiffs also argue that Aetna was coerced by the letters of The Hartford and Travelers to their respective agents.[4]

Plaintiffs' allegations of a pressure campaign are unsupported by any evidence of any meetings or other contacts between Aetna and any agents or agents' association.[5] Plaintiffs' allegations are premised on the assumption that Aetna felt compelled by the principles of the American Agency System to reject plaintiffs' offer. But, as discussed above, Aetna did not feel those principles, or its contracts

[4] As Judge Blumenfeld pointed out below, plaintiffs' claim that Aetna was coerced ". . . cuts against the plaintiffs' main contention that the rejections by the companies were the result of their having agreed among themselves to act in concert." (AII 46, n. 8)

[5] Aetna had no discussions with any other insurance company, any agent or any agents' association concerning plaintiffs' offer prior to rejecting it. The meeting with Crosson of the CAIA referred to on page six of Plaintiffs-Appellants' Brief occurred on July 19, 1962, two days *after* Aetna mailed its rejection letter to plaintiffs.

with its agents, precluded Aetna from accepting plaintiffs' proposal.

The only evidence offered by plaintiffs of a "campaign of pressure" by agents or agents' associations are various editorials critical of the Romac proposal that appeared in trade papers and agent association publications during May, June and July 1962. Aetna concedes its awareness of this adverse publicity prior to deciding to reject Romac's offer. It openly acknowledges having considered "agent opposition" as one of the grounds for rejecting the offer.

Agent opposition was simply one more reason why it was not in Aetna's economic self-interest to purchase the program. For it was the agents who would ultimately use the X-dates, and who would hopefully have voluntarily underwritten a large share of the enormous costs of the proposal.

But agent opposition was only one of the factors that finally led Aetna to reject plaintiffs' offer. The primary reasons, as discussed above in part I C, were the high total cost, the large number of X-dates Aetna would be required to purchase, the inability to utilize all these X-dates, etc. As Mr. Van Gils stated:

> "Well—let me say this, it was not an important factor in our decision. We were aware of it. Had the other factors indicated to us that we could successfully and profitably get into it, it would not have deterred us. It was not a controlling factor at all, no.
>
> "I said that we made our decision based on the other considerations. The fact of opposition to this in certain quarters was certainly well known to us. We had to consider that if we decided to go with this program and the other reasons did not exist, that our use of this would have become more difficult perhaps than otherwise, but it did not influence us in reaching our decision to say no, we can't use it." (AI 241-243)

A rather remarkable fact that plaintiffs have ignored is that at the July 10 meeting in Pelham, Mr. Ellis, recogniz-

ing that Aetna could not handle the large number of X-dates, suggested that plaintiffs sell them to the agents directly or to the National Association of Insurance Agents. Mr. Ellis went so far as to offer the good offices of Aetna to recommend the X-dates to agents, and to provide Aetna's sales organization to help market them. (AI 278) This conduct is utterly inconsistent either with plaintiffs' claim that Aetna was coerced by its agents, or plaintiffs' alternative claim that Aetna conspired to boycott plaintiffs.

The very most that plaintiffs are able to show with regard to their claim of pressure from the companies is the claim of Mr. D'Arpa[6] as to statements he attributed to Mr. Ellis of Aetna:

> "A And I asked him, of course, why it had not been accepted. He smiled and said he didn't know if it was worth the beating that they would have to take.
>
> "Q3 Was he more specific than that?
>
> "A Well, I asked him, 'What kind of a beating are you referring to?' His reply, of course, was the pressure from other companies. Then he elaborated. He went on to say that they would have to contend with the Commissioner of Insurance, and mentioned the Hartford Company, Channing Barlow. And I asked him how he fitted into the picture, and his answer was that Barlow gave out press releases, that was the first one, to all the organization publications, sent letters to agencies and he used every possible means of publicizing our particular program." (AI 59)

Ellis' elaboration of the general statement contains but two references. The first is to the announcement by Insurance Commissioner Premo that the purchase of plaintiffs' X-dates would be illegal. Even plaintiffs do not assert that an insurance company, subject to the rulings of the Com-

[6] Plaintiffs' only other citation to the record is the Ellis deposition at AI 297 which they attempt to use for the purpose of showing that Travelers' letter to its agents affected Ellis' decision to reject. But nowhere in that citation does Ellis even refer to Travelers.

missioner, is required to violate those rulings or be subject to treble damage antitrust liability.

The second is merely a reference to The Hartford letter to its agents, a fact of life facing Aetna which was not of its own making. The quoted statement falls far short even of giving rise to an inference of agreement between The Hartford and Aetna.

The purported statements of Ellis are far from complete. Missing is any reference to consideration of agent reaction, a factor which Aetna admittedly considered. Also missing are the various other reasons Mr. Ellis had given for rejection: the number, the cost, the inability to use in seventeen states, etc.

Viewed in the perspective of the evidence as a whole, the statements attributed to Mr. Ellis show only that the pronouncement of the Insurance Commissioner, and the letter of The Hartford, like the bulletins of the agents' associations, are individual factors which, among many others, were taken into consideration by Aetna in determining whether acceptance was in its economic self-interest. And its determination, after consideration of all of the factors, was that it was not. The statements do not show that Aetna was "coerced" into rejecting.

Nor do the statements show any agreement on the part of Aetna.

There is no evidence—nor do plaintiffs claim—that Aetna had any part in The Hartford's letters to its agents, in Travelers' letter to its agents, or in the letters and bulletins of the agents and agents' associations.[7]

These letters and bulletins did not result from any conspiratorial acts by Aetna: they were plain facts of life fac-

[7] Nor is there any evidence that the pronouncements from The Hartford, Travelers or any agents' association were anything other than unilateral acts.

ing Aetna when it made its decision to reject. Those facts could be considered by Aetna along with other facts relevant to Romac's proposal. Those facts could even form a part of the reason for Aetna's decision. A response by Aetna which took into account such facts—but absent agreement with any others—would still be a lawful response. Any other conclusion would mean that Aetna—given the existence of these facts which were not of its own making—could not avoid paying tribute to plaintiffs either in the form of (1) $4,000,000 a year for X-dates, or (2) treble damage liability. Aetna could not be so immobilized by acts of others.

Such a result would be contrary to reason and justice. It would also be contrary to law.

The situation is analogous to the establishment of prices. A pricing move by a competitor can not be regarded as an invitation to conspire which precludes a business from acting in its best economic interest by changing its prices where desirable. In *United States v. Standard Oil Co.*, 316 F.2d 884, 896 (7th Cir. 1963), the court stated:

> "All defendants seem to agree that the instructions as given, told the jury that any defendant which took any action of its own after hearing of Standard's announcement, was automatically guilty of conspiracy. If such is a correct interpretation of the trial judge's charge, it would be erroneous. The 'invitation' referred to in *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227, 82 L.Ed. 610 was a solicitation to act in concert. Certainly, any defendant which heard of Standard's price announcement was not thereby immobilized and precluded from acting in a normal fashion as its interests might dictate so long as it was not pursuant to an understanding or agreement."

This is particularly the case where, as here, acceptance of the proposal would have been contrary to Aetna's self-interest. As Judge Nordbye stated in *Cohen v. Curtis Pub. Co.*, 229 F.Supp. 354, 363 (D. Minn. 1963), *appl. dismissed,*

333 F.2d 974 (8th Cir. 1964), *cert. denied,* 380 U.S. 921 (1965), in granting summary judgment for defendants:

> "Any mere parallel conduct under the circumstances here as between Curtis and Hearst cannot be considered as evidence of a conspiracy or concert of action among them, particularly when the facts unequivocally establish that any other consideration of Cohen's plan by these publishers would have been utterly imprudent."

To be sure, liability could be imposed upon Aetna if it had communicated with the other defendants and agreed upon a common course of action. The necessary ingredient is commitment, a 'meeting of the minds'. Unilateral response to a given set of facts is insufficient. As Judge Feikens recently stated in *United States v. General Motors Corp.,* 1974 Trade Cas. ¶ 75,253 at 96,670 (E.D. Mich., S.D. 1974):

> "The United States Court of Appeals for the Sixth Circuit early expressed essentially the same view by stating that an antitrust agreement may be inferred only when it appeared that defendants had a 'meeting of the minds' and were 'working together understandingly' to achieve a common objective. *American Tobacco Co. v. United States,* 147 F.2d 93, 107 (7th Cir. 1944), *aff'd,* 328 U.S. 781 (1946)."

Judge Feikens continued:

> "The *Standard Oil* decision, thus, requires evidence that each defendant gave its commitment to its alleged co-conspirators that it would raise prices. As the court stated, unless a defendant understands from something said or done that it is committed to the other defendants to raise prices, it cannot be a conspirator since 'there is no such thing as an [unwitting conspirator.]' *United States v. Standard Oil,* 316 F.2d at 890. See also, *United States v. Charles Pfizer Co.,* 367 F. Supp. 91, 99 (S.D.N.Y. 1973); *United States v. National Malleable & Steel Castings Co.,* 1957 Trade Cases. ¶ 68,890 (N.D. Ohio 1957) (p. 73, 601, *aff'd,* 358 U.S. 38 (1958). This principle is basic to conspiracy law generally. See

United States v. Van de Carr, 343 F.Supp. 993, 1000 (C.D. Cal. 1972). Therefore, the government must prove more than that each defendant was pursuing an objective which its competitors were also anxious to achieve. The evidence must also establish that each defendant had previously assured the other that it would eliminate fleet allowances."

It follows from the above that plaintiff must prove that Aetna acted pursuant to agreement, that there was a "meeting of the minds," and that defendants were "working together understandingly." And there simply is no such evidence.

Plaintiffs also fail on their "pressure" argument for the same reason they fail on their conscious parallelism argument. As plaintiffs argue (Plaintiffs-Appellants' Brief, p. 44):

> "Response to pressure resulting in a business decision *one would otherwise not have taken* is a basis for finding a Sherman Act violation." (emphasis added)

Assuming *arguendo* that this accurately states the law,[8] the argument fails because there is no evidence that Aetna's rejection was a business decision it "would otherwise not have taken." All the evidence is to the contrary.

Plaintiffs cite in support of their allegations of conspiracy the case of *United States v. General Motors,* 384 U.S. 127 (1966). In that case there was express agreement between General Motors and the conspiring dealers as to the actions to be taken. Meetings were held. The scheme was enforced by the "ultimate power of General Motors"; G.M. dealers held conferences with offending dealers in which the latter were made to "comply". In the instant case, plaintiffs have presented no evidence of meetings or

[8] *Cf. First National Bank of Arizona v. Cities Service Co., supra* at 280 n. 16: ". . . nor would it be appropriate . . . for us to pass upon petitioner's theory of combination through coerced acquiescence and the accompanying difficult questions it would raise concerning Cities' liability to petitioner or possible rights over against the other defendants."

express agreement between Aetna and any agents. Nor do plaintiffs allege the "ultimate power of Aetna" as enforcing the "scheme" against them; rather, the plaintiffs stress that it was pressure by *agents* which performed that function.

Further, a crucial point in the *General Motors* conspiracy was that it was directed toward eliminating *existing retail businesses* by depriving them of the *goods* needed to survive. The Court, in discussing the precedents supporting its holding—*Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958); *Fashion Originators' Guild of America v. Federal Trade Comm'n.*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers Ass'n. v. United States, supra*—stated:

> "The principle of these cases is that where businessmen concert their actions, *in order to deprive others of access to merchandise which the latter wishes to sell to the public,* we need not inquire into the economic motivation underlying their conduct." 384 U.S. at 146 (emphasis added).

The First Circuit in *Ford Motor Co. v. Webster Auto Sales, Inc.*, 361 F.2d 874 (1966), a case with facts similar to those of *General Motors,* also relied on this "principle" (quoting verbatim, at page 882, the above excerpt). However, these factors of refusal to provide merchandise and elimination of established competitors are strikingly lacking in the instant case. As pointed out above, Aetna offered to help Romac sell X-dates directly to Aetna's agents. And the *Webster's Auto Sales* conspiracy, like that in *General Motors,* also featured direct communications between and meetings among the manufacturer and the dealers—again missing in this case.

D. The Standard Agency Agreement Does Not Violate The Antitrust Laws: It In Fact Promotes Competition

Plaintiffs' final attempt to create an antitrust violation out of their dealings with the insurance companies consists of allegations that the standard contract between the "agency companies" and their independent agents is itself violative of the antitrust laws. In particular, plaintiffs claim that the contracts, sometimes referred to as the American Agency System, constitute a restraint of trade in that they prevent competition in the marketing of X-dates.

It has already been conclusively shown that the standard agency contract does not bar competition in the marketing of X-dates, and did not cause Aetna to reject plaintiffs' offer. Accordingly, plaintiffs have no standing—at least as to Aetna—to complain of the contractual provision. That aside, the particular clause which plaintiffs allege violates the antitrust laws pertains only to the disposition of an agent's records, as between the insurance company and the agent, and only when he terminates his agency with the company. It does not preclude the insurance company from obtaining X-dates in any other fashion, or from any other source, including a firm such as Romac. The scope of the American Agency System is no greater than this:

> ". . . upon termination of an insurance agency, if the agent's financial obligations to the insurer are paid in full, all rights in the expiration data of existing insurance procured by the agent, belong to him in order that the '. . . established business of an insurance agent may be preserved to him as far as possible upon the termination of his agency, *and to that extent and no further . . .*'," *Hedlund v. Farmers Mut. Aut. Ins. Co.*, 139 F. Supp. 535, 536 n. (D. Minn. 1956) (emphasis added).

It has long been established that the American Agency System contract gives the independent agent a "property

right" in the X-dates of his customers. *Alliance Ins. Co. v. City Realty Co.*, 52 F.2d 271, 277 (M.D. Ga. 1931); *Kerr & Elliot v. Green Mountain Mut. Fire Ins. Co.*, 18 A.2d 164, 168-69, 111 Vt. 502 (1941); *Northwest Underwriter, Inc. v. Hamilton*, 151 F.2d 389, 391-92 (8th Cir. 1945); *Hedlund, supra* at 537. Indeed, as Judge Blumenfeld noted in his opinion below, the independent agent may have a right to his customers' X-dates analogous to that which he would have in a trade secret. *See also*, Restatement, Torts § 757, comment b. Cf. *Town & Country House & Homes Services, Inc. v. Evans*, 150 Conn. 314, 318-19, 189 A.2d 390 (1963).

The contract provision in question only preserves to the agent his "established business . . . upon the termination of his agency." *Hedlund, supra* at 536. It is not an unreasonable restraint of trade. The independent insurance agents are "small struggling competitors seeking . . . customers"; this is a claim to which the courts have often afforded protection, under the antitrust laws, especially as against large corporations to whom they stand in a vertical relationship. See *Simpson v. Union Oil Co.*, 377 U.S. 13, 17, 20-21 (1964); *Atlantic Refining Co. v. Federal Trade Comm'n.*, 381 U.S. 357, 368 (1965); *Albrecht v. The Herald Company*, 390 U.S. 145 (1968); *Sun Oil Co. v. Federal Trade Comm'n.*, 350 F.2d 624, 628-29, 635-36 (7th Cir. 1965), *cert. denied*, 382 U.S. 982 (1966); *Atlantic Refining Company v. Federal Trade Comm'n.*, 344 F.2d 599, 605-606 (6th Cir. 1965), *cert. denied*, 382 U.S. 939 (1965), *rehearing denied*, 382 U.S. 1000 (1966). If independent agents were not afforded this contractual protection, an insurance company would be free, upon termination of its relationship with an agent, to use the X-dates of his customers to take their business away from him and thereby possibly destroy the agent's business and remove a competitive force from the market place. But, of course, this limited contractual protection is far removed from plaintiffs' claim that agents' contracts with Aetna somehow acted as a restraint upon plaintiffs' ability to market X-dates.

III.

THE DISTRICT COURT APPLIED THE CORRECT STANDARD IN DETERMINING THAT SUMMARY JUDGMENT SHOULD BE GRANTED

Federal Rule of Civil Procedure 56(c)[9] provides that on motion, summary judgment

> ". . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(e) provides

> ". . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Summary judgment is appropriate where uncontradicted affidavits and sworn testimony are submitted in negation of a generally pleaded conspiracy claim. *Gold Fuel Service, Inc. v. Esso Standard Oil Co.*, 306 F.2d 61 (3rd Cir. 1962); *United States v. Johns-Manville Corporation*, 245 F.Supp. 74, 79 (E.D. Pa. 1965).

It is plaintiffs' contention that the District Court applied an incorrect standard in passing on defendants' motion for summary judgment. Plaintiffs, citing *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), claim that summary judgment is to be used sparingly in antitrust liti-

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[9] It is well to recall the laudatory purposes served by Rule 56, for both litigants and an overburdened judiciary. As to the latter, see Burger, *The State of the Judiciary — 1970*, 56 A.B.A.J. 929 (1970); Friendly, *Federal Jurisdiction: A General View* (1973).

gation, particularly in cases where (as plaintiffs attempt to characterize this one) "motive and intent" are important factors.

The *Poller* Court cited two factors which controlled its reversal of a summary judgment for defendants in that case. The first was that plaintiff's "proof" was primarily in the hands of the alleged co-conspirators. In the instant case, however, plaintiffs have already conducted discovery for over eight years. There are over 150 pleadings (including answers by defendants to a substantial number of interrogatories), numerous exhibits and affidavits, and over 5000 pages of depositions, including the testimony of every important insurance company executive involved in passing on plaintiffs' offer. Even the Justice Department has been involved in the search for the "conspiracy". With all this evidence available, plaintiffs can hardly contend that they require a trial to "ferret" the evidence necessary to prove their case. (Compare *Poller,* wherein the Court noted, at page 470, that plaintiff had not had the opportunity to cross-examine a key witness to defendants' theory of the case who had allegedly been deeply involved in the conspiracy). As Judge Smith stated for this Court in *Perma Research and Development Co. v. Singer,* 410 F.2d 572, 578 (2d Cir. 1969), "Summary judgment cannot be defeated by the vague hope that something may turn up at trial." See also *Beckman v. Walter Kidde & Co.,* 316 F. Supp. 1321, 1324 (E.D.N.Y. 1970), *aff'd,* 451 F.2d 593 (2d Cir. 1971), *cert. denied,* 408 U.S. 922 (1972).

The other controlling circumstance in *Poller* was that, in the Court's view, the credibility of adverse witnesses was important to the resolution of important fact issues. Plaintiffs have attempted to characterize the instant case as one in which credibility—notably that of defendants' officials—is similarly important. In response to this contention, however, Judge Blumenfeld stated in his opinion:

"The plaintiffs cannot defeat defendants' motions for summary judgment on the mere hope that they may be able to discredit by cross-examination at trial the defendants' denials of any conspiratorial conduct in their respective rejections of plaintiffs' proposal. *Cf. Dyer v. MacDougall,* 201 F.2d 265, 269 (2d Cir. 1952)." (AII 40-41)

Judge Blumenfeld correctly enunciated the position of this Circuit. *Dyer v. MacDougall,* 201 F.2d 265 (2d Cir. 1952), was a suit for slander and libel. The defendant presented affidavits from each of the four persons who allegedly heard the slander, denying that it had been uttered. Although acknowledging the importance of demeanor evidence and the possibility that demeanor evidence might convince the trier of fact that the four affiants were lying, this Court affirmed the grant of summary judgment for the defendant. The Court noted, at page 268, that it must be assumed that a witness' testimony at trial will conform to his affidavit. *Accord, Dale Hilton, Inc. v. Triangle Publications, Inc.,* 27 F.R.D. 468 (S.D.N.Y. 1961).

Dyer is an even more compelling precedent when one considers that the opinion was written by Judge Learned Hand and concurred in by Judge Frank, the two members of this Court who for many years took a very conservative approach to the use of summary judgment. See *6 Moore's Federal Practice* ¶ 56.15 [1.-02], at 2291. If anything, this Court's use of summary judgment has been even more liberal since Federal Rule 56(e) was amended in 1963. See, *e.g.,* Chief Judge Kaufman's opinion in *Dressler v. MV Sandpiper,* 331 F.2d 130 (2d Cir. 1964).

The Supreme Court put its *Poller* holding in proper perspective in affirming the decision of this Court (361 F.2d 671) in *First National Bank of Arizona v. Cities Service Co., supra,* an antitrust case very much like the instant one:

"[Plaintiff] argued that the evidence showed that Cities had embarked on a course of dealing with Wal-

dron and then inexplicably had broken it off, and that this sequence of events was in itself sufficient evidence of conspiracy to withstand summary judgment . . . ." 391 U.S. at 266.

With respect to the question of "motive", the Court stated that, given no contrary evidence, a jury question might well be presented as to defendant's motives in not dealing with the plaintiff, but *not* where there was evidence explaining defendant's failure to deal. The Court stated:

> ". . . [I]t is only the attractiveness of petitioner's offer that makes failure to take it up suggestive of improper motives. However, it has been demonstrated above that for Cities to enter into any deal with Waldron for Iranian oil would have involved it in a variety of unpleasant consequences sufficient to deter it from making any such deal. Therefore, not only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure, but the former inference is more probable." 391 U.S. at 279-280.

The District Court for the District of Oregon recently granted summary judgment for defendants in a "refusal to deal" case having facts similar to both *Cities Service* and this case. *Pacific Tobacco Corp. v. The American Tobacco Co., supra.* In fact, the court reached this result despite some evidence, produced by plaintiff, that one of the alleged co-conspirators had been coerced into terminating dealings with plaintiff.

Judge Blumenfeld correctly followed the *Cities Service* standard in his ruling below. He noted that Federal Rule 56(e) places on plaintiffs "the burden of producing evidence of the conspiracy [they] alleged . . . after [the defendant] has conclusively showed the facts upon which [the plaintiffs] relied to support his allegation were not susceptible of the interpretation which he sought to give them." (AII 41)

And in response to plaintiffs' contention that *Poller* mandated denial of summary judgment motions in complex antitrust litigation, Judge Blumenfeld again followed *Cities Service:*

> "The Supreme Court has decisively rejected the notion that 'Rule 56(e) should, in effect, be read out of antitrust cases [so as to] permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support these allegations. . . . While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.' *Id.,* [391 U.S.] at 289-90." (AII 41-42)

Therefore, the correct approach to defendant's properly-supported motion for summary judgment, and the approach followed by the District Court below, is to require the plaintiffs to provide some evidence, beyond the allegations of their pleadings, that the conspiracy they allege did exist, and thus raise a material issue for the trier of fact.[10]

IV.

IT IS NOT NECESSARY FOR THIS COURT TO DECIDE WHETHER PLAINTIFFS' OFFER VIOLATED THE ANTITRUST LAWS

In his memorandum opinion granting summary judgment for the defendants, Judge Blumenfeld discussed the "risk of illegality of plaintiffs' proposed exclusive dealing arrangement." (AII 48-54) This was an issue "not adverted to by either party, and not briefed." (AII 49) Plaintiffs now contend that (1) Judge Blumenfeld concluded

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[10] The Court should also note that the amendment to Federal Rule 56(e), requiring an adverse party to respond to a properly-supported motion for summary judgment with some evidence creating a genuine fact issue, was added in 1963, after *Poller* was decided.

that plaintiffs' proposal, if accepted, would be an antitrust violation; and (2) this conclusion controlled Judge Blumenfeld's decision. Both of these contentions are incorrect.

Judge Blumenfeld observed that one of the "selling points" of plaintiffs' proposal was the fact that the X-dates would be sold to *only* one "direct writer" and *only* one "agency company". Judge Blumenfeld raised the possibility that an agreement to sell X-dates on a national scale to one insurance company might be unlawful, a possibility that made it risky for any insurance company to accept plaintiffs' offer. The issue, as Judge Blumenfeld put it:

> ". . . is not whether the proposal should have been rejected as one which would result in an unlawful distribution system, but whether it was so fraught with elements of such a system that the *risk* of its illegality was substantial enough to justify the defendants' refusal to be a party to it." (AII 49) (Emphasis in original)

The Judge did not conclude, however, that plaintiffs' offer was illegal, and specifically stated: "Whether the plaintiffs' proposal would, if implemented, have led to actual antitrust liability *does not have to be decided.*" (AIII 54-55) (Emphasis added)

All he concluded was that

> ". . . it is surely plausible that these questions might have been decided adversely to any defendant who dealt with the plaintiffs on the plaintiffs' terms. It follows that the Damoclean sword of antitrust liability which would have hung over the head of any defendant which had committed itself to deal with plaintiff, rendered acceptance of the plaintiffs' proposal so risky that rejection cannot be considered to have been contrary to any defendant's 'self-interest'." (II 55)

Further, this issue did not control the District Court's decision, since the opinion stated ample other reasons why rejection of plaintiffs' offer was not contrary to defendants' self-interest. The Court noted the defendants' inability to absorb the entire amount of X-dates; the heavy annual projected cost; the "inherent commercial impracti-

cability" of plaintiffs' proposal; the likely inability of the agency companies to re-sell the X-dates to their independent agents; and the fact that the defendants had no prior dealings in X-dates. All these factors together established that rejection of plaintiffs' offer was not contrary to defendants' self-interest, and thus destroyed any inference of conspiracy raised by defendants' allegedly parallel behavior.

Further, the District Court's decision also turned on its rejection of plaintiffs' theories of "conspiracy" or "conscious parallelism" between the insurance companies and the CAIA; and on its proper ruling that plaintiffs had not raised a "genuine issue" as required by Federal Rule 56(e) and *First National Bank of Arizona v. Cities Service Co., supra.*

It is therefore clear that it was not necessary for the District Court to treat the "exclusive dealing" issue, much less decide that plaintiffs' offer was illegal, in order to grant summary judgment for defendants. This Court may accordingly affirm the summary judgment without exploring the legality or illegality of plaintiffs' offer.

CONCLUSION

For all of the above reasons, Aetna respectfully submits that the decision of the District Court was correct and should be affirmed.

Respectfully submitted,

Defendant-Appellee
The Aetna Casualty and Surety Company

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Re: Doc. No. 74-1965
Romac Resources, Inc. v.
Hartford Accident & Indemnity, et al.
Modern Home Institute, Inc. v.
Hartford Accident & Indemnity, et al.

tlemen:

Enclosed for filing in the above matter are twenty-five copies the brief of Defendant-Appellee, The Aetna Casualty and Surety pany. Please evidence receipt of the above by stamping the en- sed copy of this letter and returning it in the stamped envelope.

Pursuant to Federal Rules of Appellate Procedure 25 and 31, copies of the brief have been mailed today to each of the fol- ing: J. Daniel Sagarin, Esq.; John L. Warden, Esq.; George ine, Esq.; George D. Brodigan, Esq.

Very truly yours,

Robert M. Stephan

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